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No. 96-1750

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CAROLEE A. MEDICO,

Petitioner,

vs.

CHARLES P. MEDICO, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did not the United States Court of Appeals properly affirm the order of the United States District Court for the Middle District of Pennsylvania, which appropriately dismissed the petitioner's section 1983 civil rights action against defendant-respondent Maxine Williams since it failed to allege state action, deprivation of constitutionally protected rights and class based discrimination?

2. Was not the District Court under no obligation to grant petitioner leave to file a second amended complaint because petitioner never moved to do so, because of prejudice to the defendants and because an amended complaint would be in vain because of the applicable statute of limitations and immunity?

PARTIES TO THE PROCEEDING

The petitioner is plaintiff Carolee A. Medico. The respondents are responding defendant Maxine Williams and defendants Charles P. Medico, Lawrence D. MacDonald, Patrick J. Toole, Jr., Thomas A. Makowski, Susan Latona, Chester Muroski, Correale Stevens, Donald O'Malley, Kathryn Davis, Sandor Yelen, Hugh F. Mundy, Eugene Duffy, Anthony Terraciano, First Fidelity Bank, N.A., Pennsylvania, Robert E. Colville, Michael J. DiMarco and Donald D. Dolbin.

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STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court pursuant to 28 U.S.C. §1254(1). The judgment order of the Court of Appeals was issued on February 6, 1997.

COUNTERSTATEMENT OF THE CASE

Plaintiff petitioner, acting *pro se*, filed a complaint on May 26, 1995. Thereafter, an amended complaint was filed on September 5, 1995. Plaintiff's amended complaint alleges violations of the Racketeer Influenced and Corrupt Organization Act (R.I.C.O.), 18 U.S.C. §1961, et. sec., as well as Civil Rights violations pursuant to 42 U.S.C. §1983 and §1985.

Defendant respondent Maxine Williams [hereinafter known as "Williams"] was named for the first time in the amended complaint.

Plaintiff's federal court suit stems from a state court divorce proceeding. Plaintiff alleges that during the state divorce proceeding, which continues to this date. five state court judges; two divorce court masters; two district attorneys; a bank; two bank officials; two court reporters (including responding defendant Williams); two attorneys; and the Luzerne County Prothonotary conspired to deprive her of constitutionally protected rights. Defendant Williams acted as a court reporter before a court appointed master during a divorce proceeding which took place on November 16, 1989. Thereafter, Williams gave testimony regarding the November 16, 1989 proceeding.

Each of the defendants filed motions to dismiss the federal court action. By order and memorandum dated February 1, 1996, Judge Rambo granted the various motions to dismiss. Thereafter, plaintiff sought reconsideration. By order and memorandum dated April 10, 1996, the motion for reconsideration was denied. Plaintiff's appeal to the Court of Appeals, followed.

The Court of Appeals affirmed the judgment of the District Court by Judgment Order of February 6, 1997.

Plaintiff now petitions this Honorable Court for writ of certiorari. The plaintiff appears to focus her allegations of error on her claims under 42 U.S.C section 1983 and apparently abandons further appeal of the remainder of her original "claims," including her R.I.C.O "claims" 18 U.S.C. §1961 to 1968) and those brought under 42 U.S.C. §1985.

REASONS FOR DENYING THE WRIT

A. THE DISTRICT COURT CORRECTLY DISMISSED THE CIVIL RIGHTS AND CONSPIRACY CLAIMS AGAINST DEFENDANT WILLIAMS BECAUSE THE AMENDED COMPLAINT FAILED TO ALLEGE STATE ACTION; DEPRIVATION OF CONSTITUTIONALLY PROTECTED RIGHTS; AND CLASS BASED DISCRIMINATION.

Plaintiff's amended complaint alleges a violation of 42 U.S.C. §1983. This section provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured. . . .

In pleading §1983 actions, "More is needed than a naked averment that a tort was committed under the color of state law." *Gittlemacker v. Prasse*, 428 F.2d 1, 6 (3d Cir. 1970).

> . . . the wrongdoing must amount to a deprivation of a right, privilege, or immunity secured by the Constitution and the laws of the United States. And this must be set forth with specificity; mere argumentative and conclusory allegations will not suffice.
>
> The requirement of some semblance of factual specificity becomes necessary if the Federal courts are to exercise jurisdiction under the Civil Rights Act. Without a proper allegation of Constitutional deprivation, an action requesting damages for personal injuries sounds only in common law or statutory tort and, because no federal interest is involved, is triable only under state law in a state court.

Id.

Plaintiff's amended complaint pleads no facts indicating that defendant Williams, acted under color of state law. Nor does the complaint set forth with specificity the right or privilege infringed by defendant Williams' conduct. A review of the amended complaint demonstrates that it contains nothing more than conclusory and boiler plate language. Thus, it was not abuse of discretion for the trial court to dismiss the §1983 count against defendant Williams.[1]

B. THE DISTRICT COURT WAS NOT OBLIGATED TO GRANT PLAINTIFF LEAVE OF COURT TO FILE A SECOND AMENDED COMPLAINT BECAUSE PLAINTIFF NEVER MOVED TO DO SO AND AN AMENDED COMPLAINT WOULD BE IN VAIN BECAUSE OF APPLICABLE STATUTE OF LIMITATIONS AND IMMUNITY.

At p. 19 of her Court of Appeals brief, plaintiff concedes that her "pleadings were technically deficient regarding fact," thus confirming the argument defendant Williams makes in the preceding portions of this brief. However, plaintiff argues that the trial court erred in not allowing her leave of court to amend her complaint a second time. This argument is without merit. Although leave to amend is to be freely given, granting same is committed to the sound discretion of the trial

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[1] The district court was correct in dismissing the plaintiff's allegations under R.I.C.O. and §1985. Plaintiff's amended complaint fails to plead a cause of action under 42 U.S.C. §1985, since it speaks only of "spouses of wealthy, powerful and prominent men," does not allege *facts* of a conspiracy to deprive her of a constitutionally protected right and does not identify the constitutionally protected right. Plaintiff's amended complaint failed to allege a R.I.C.O. violation against defendant Williams, since she failed to identify: predicate acts; a distinct enterprise; injury to business or property; and a nexus to interstate commerce. 18 U.S.C. §1962(c) and (d). Since the plaintiff has not petitioned this Honorable Court for review of these issues, defendant Williams will not address them in detail.

court. *Gay v. Petsock*, 917 F.2d 768 (3d Cir. 1990). In the case at bar, the trial court did not abuse its discretion. Plaintiff had once previously been allowed to amend her complaint. It was the amended complaint that was being scrutinized in the various motions to dismiss. Further, plaintiff never formally requested leave of court to amend a second time despite a previously issued court order, entered on November 29, 1995, which directed that no amended complaints be filed except upon leave of court. The trial court even went as far as to instruct the plaintiff concerning the procedure by which she could seek leave to amend a second time. Plaintiff acknowledges as much in her Court of Appeals brief at p. 20:

> The District Court was well aware on November 29, 1995, after the case management conference, that the plaintiff intended to file a second amended complaint. When opposing counsel became aware of the plaintiff's intention to file a second amended complaint, they voiced their concerns to the Court and charged that the *pro se* plaintiff intended to file a second amended complaint without leave of court; *whereupon the District Court informed the plaintiff of the procedure by which she could seek leave of Court to amend her complaint. The Court also instructed the plaintiff that she should file a Motion and attach a copy of the proposed amended complaint to the motion so that it could be reviewed by the Court.* However, no date was set by which the plaintiff was required to file her Motion for Leave to File the Second Amended Complaint. *Plaintiff's Brief*, p. 20. (Emphasis added).

Despite acknowledging these specific instructions from the Court, plaintiff *never* filed a motion seeking leave to amend a second time. As a matter of fact, it was not until after the Court ruled on the various motions to dismiss that the plaintiff complained she should be allowed to amend a second time. Plaintiff is seemingly of the position that the trial court should have acted as more of an advocate to her position by counseling her on dates and times within which to file a second

amended complaint. Her position is ludicrous. Although she was acting without a lawyer, she could not expect the Court to hold her hand and walk her through the process step by step. Plaintiff choose not to file a motion to seek leave to amend a second time and, therefore, cannot now complain that the trial court abused its discretion in not granting a motion that was never filed. In *Coates v. Illinois State Board of Education*, 559 F.2d 445 (7 Cir. 1977), the Court of Appeals held the trial court "did not abuse its discretion in denying leave to amend the complaint, because such leave was never sought." *Id.* at 451.

Also, to permit the plaintiff to amend her amended complaint at this late date would prejudice defendant Williams in her defense of plaintiff's claims.

Even if the trial court were to allow plaintiff to amend a second time, the effort would be in vain because plaintiff's claims are barred by doctrines of immunity and applicable statute of limitations.

According to her amended complaint, the plaintiff's claims against defendant Williams stem from a state court proceeding in which plaintiff alleges Williams took "incomplete and untruthful court transcripts" (*see, plaintiff's amended complaint, ¶28(c)*). Plaintiff also asserts that defendant Williams testified "falsely regarding the identity of the person whom she admitted instructed her not to include testimony taken under oath in the official court record." *See, plaintiff's complaint*, ¶58 (10). While her amended complaint does not set forth dates upon which Williams' conduct allegedly took place, judicial notice of documents filed in the underlying state court action, and previously made part of the District Court record, demonstrate that the alleged incomplete and false reporting of testimony occurred on November 16, 1989 and that plaintiff was aware of same as early as June 18, 1991. This is evidenced by a petition plaintiff filed in state court to "set aside and abrogate the property settlement." Plaintiff's complaint against defendant Williams was not filed until September 5, 1995, or four years and three months after

plaintiff became aware of the existence of and source of an alleged injury. The civil rights complaint filed by the plaintiff has a two year statute of limitations as provided by 42 P.A.C.S. §5524. *See Smith v. City of Pittsburgh*, 764 F.2d 188, 194 (3d Cir. 1985). A federal claim accrues "as soon as a potential claimant is aware, or should be aware, of the existence of and source of injury." *Oshiver v. Levin, et al.* 38 F.3d 1380, 1384, n. 1 (3d Cir. 1994). It is upon awareness of actual injury, not upon awareness that the injury constitutes a legal wrong, that a federal claim accrues. *Oshiver*, 38 F.3d at 1386. Since more than two years have elapsed from the time the plaintiff was made aware, or should have been aware, of the source of a potential claim against Ms. Williams, the statute of limitations has run and her claims are time barred.

Plaintiff also alleges that defendant Williams testified falsely in the underlying state court action. However, this Honorable Court specifically addressed the issue of absolute witness immunity in §1983 actions in the case of *Briscoe v. Lahue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L.ed. 2d 96 (1983). There, this Court held:

> In short, the common law provided absolute immunity from subsequent damages liability for all persons -- governmental or otherwise -- who were integral parts of the judicial process. It is equally clear that §1983 does not authorize a damages claim against private witnesses on the one hand, or against judges or prosecutors in the performance in their respective duties on the other.

Briscoe, 460 U.S. at 336.

Thus, any claims plaintiff has against Williams concerning her testimony as a private witness in the underlying state court action are barred by absolute witness immunity.

Thus, even if the plaintiff were allowed to amend her complaint a second time, such amendment would be in vain because her claims are barred by absolute immunity and the statute of limitations.

Finally, the plaintiff is precluded from pursuing an action in federal court which seeks collateral review of a prior state court decision.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted

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